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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1952

No. 395

JAMES A. VAUGHAN,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION,

Bankrupt

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Wilmington, Delaware.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 395

JAMES A. VAUGHAN,

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PETROLEUM CONVERSION CORPORATION,

Bankrupt

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James A. Vaughan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered May 16, 1952, affirming the judgment of the United States District Court for the District of Delaware, entered August 24, 1951, denying your petitioner's Petition for Review and affirming the Findings of Fact, Conclusions of Law and Opinion of the Referee filed July 7, 1950, and the Order of the Referee thereon entered September 7, 1950.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (R 110), filed on May 16, 1952, is reported at 196 Fed. 2d, 728, and the opinion of the District Court (R 65), filed on August 24, 1951, is reported at 99 F. Supp. 899.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1254(1).

Questions Presented

1. Where petitioner, an officer of bankrupt at the time of its adjudication in bankruptcy, was listed as a scheduled creditor and filed proof of claims, and the Trustee thereafter at the beginning of the bankruptcy proceedings and based on his accountant's report, sought authority from the Referee to begin proceedings against petitioner for restitution of all payments made to him for salary and for legal services rendered to bankrupt and the Referee determined and ruled of record that the did not have jurisdiction to determine the substantial adverse claims between the Trustee and petitioner, did the Referee have the power thereafter in a summary proceeding to determine such claims?

2. Where the Referee at the beginning of the proceedings, with petitioner's proof of claims and the Trustee's accountant's report and "Mr. Cooch's Memorandum" submitted as the Trustee's report before him, determined and ruled that he did not have jurisdiction to determine the substantial adverse claims between the Trustee and petitioner, did the Referee thereafter have jurisdiction to determine the identical adverse claims based on Trustee's counterclaim filed at the close of taking testimony?

3. Did the Court of Appeals and the District Court below

fail to discharge their judicial responsibilities by wholly omitting from their respective opinions any consideration of the Referee's determination and rulings of record that he did not have jurisdiction in summary proceedings to determine the substantial adverse claims between the Trustee and petitioner, although urged before both courts?

4. Did petitioner, before or after the Referee made his jurisdictional determination and rulings, consent to the Referee's exercising summary jurisdiction to determine Trustee's adverse claims?

5. Did petitioner make timely formal objections to the Referee's exercising summary jurisdiction over Trustee's adverse claims?

6. Did the previous final determination of the question of petitioner's adverse interest to the bankrupt in an action involving the same parties and the identical question of adverse interest urged here bind the Trustee in this action?

Summary Statement of the Matters Involved

On March 25, 1938 one Albert G. Dickinson commenced an action in the United States District Court for the Southern District of New York against defendants Arthur W. Rinke, Fred B. Lloyd, members of a Custodian Committee of the Board of Directors of Petroleum Conversion Corporation and others, to impress an equitable lien upon, and for an accounting and discovery with respect to large blocks of stock issued in the name of defendant Lloyd by, and then in possession of Petroleum, not then a party to the action. Plaintiff Dickinson's claim was dismissed after trial, and on appeal the judgment was reversed by the Court of Appeals for the Second Circuit, and the action remanded for a new trial (*Dickinson* v. *Rinke et al*, 132 F(2) 805).

Following Dickinson's action Petroleum's Board of Directors ordered its Management Committee to investigate Dickinson's demands for delivery of said stock. Your

petitioner, as a member of that committee, conducted such investigation (R 43).

Knox Process Corporation, Petroleum's predecessor, was without adequate funds in 1924 to carry out its purpose to develop an oil-cracking process and liens had been filed against its pilot plant in Texas City, Texas. Knox bondholders and others during 1925-1926 subscribed and paid to one Arthur W. Rinke, their Agent, some $600,000 for the purchase of such liens and for current experimental operating uses of Knox (and for the ultimate benefit of Petroleum) under subscription agreements pursuant to which they received Petroleum stock (R 42, 43).

The investigation disclosed that Lloyd (President and Director of Knox and later of Petroleum to the knowledge of Dickinson) in December, 1925, in behalf of Dickinson, but without knowledge on the part of the Rinke Agency Subscribers, purchased the Knox plant at a mechanics' lien foreclosure sale for one-half the face amount of the liens and in connivance with Rinke thereafter obtained $176,-245.24 of the funds of the Subscribers, $87,310.28 of which, plus interest of $1,624.68, Rinke paid to Dickinson to reimburse him for the purchase price of the Knox plant, and paid to Lloyd an additional $87,310.28 which Dickinson and Lloyd divided equally between them as their "profits" on the transaction.[1]

On February 9, 1939 such frauds were reported to the Board, Dickinson's demands were rejected, and counter defensive action by Petroleum against Dickinson and Lloyd was authorized (R 19, 21, 36-37, 43-44).

On March 15, 1939 Petroleum, by its attorneys Richards

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[1] *Dickinson* v. *Rinke et al.*, No. 86-366 United States District Court, S.D.N.Y., consisting of 167 pages is not reported but referred to in part only in 11 Fed. Rules Serv. 489, and see also *id.* 885; affirmed June 24, 1952, 197 F. (2d) 973. For the reason that the District Court decision is not reported all references thereto are to pages in the Transcript of Record on Appeal. Transcript of Record, p. 156.

Layton & Finger, of Wilmington, Delaware, commenced an action against Dickinson and Lloyd in the Court of Chancery for New Castle County, State of Delaware, the state of its incorporation, for cancellation of large blocks of its stock, including that issued in the name of Lloyd and sought by Dickinson, on the ground of illegal issuance, and also for the recovery from Dickinson and Lloyd of $87,-310.28 fraudulently appropriated by them and for which its stock had been issued. Meantime, prior to completion of service in the Delaware action, Dickinson commenced two other actions against Petroleum, in the United States District Court for the District of New Jersey allegedly in aid of his New York action and in the Chancery Court of New Jersey, seeking to rescind and annul a settlement agreement between him and Petroleum which terminated his long patent infringement litigation attacking Petroleum's patent structure. The latter action was removed to the District Court. Petroleum's Delaware action was not prosecuted (R 4, 19, 44, 45).

On April 3, 1939 Petroleum filed an answer to Dickinson's Complaint in the New Jersey action and also a Counterclaim for cancellation of its stock sought by Dickinson and for recovery from Dickinson and Lloyd of said $87,310.28 (R 4, 45).

When Dickinson commenced his action in the District Court for New Jersey on March 20, 1939 Petroleum had an outstanding unsecured note indebtedness of some $37,000, all of which was due to Subscribers for direct loans by them to Petroleum.

Dickinson was moving affirmatively against Petroleum in his New York and New Jersey actions, seeking a large block of its stock and renewing his attack on Petroleum's patent structure. Petroleum was therefore required to defend in any event. All Subscribers had become Petroleum stockholders for the amount of their respective subscrip-

tions. Petroleum's unsecured note indebtedness was owed to Subscribers. There was only one record of the Dickinson-Lloyd frauds to be presented at the trial (R 4, 7, 11-12, 16, 28, 46).

Considering these circumstances, the attorneys for Petroleum in Dickinson's New Jersey action, first Hon. Arthur T. Vanderbilt and later Shelton Pitney, Esq., of the firm of Pitney, Hardin & Ward, of Newark, N. J., recommended to Petroleum and your petitioner as its counsel that the Subscribers should intervene as a class and file a Counterclaim for $87,310.28 not only to foreclose any possible escape by Dickinson in event the Court should hold Petroleum not entitled but also that the rights thereto as between Petroleum and the Subscribers should be determined in one suit and thus avoid possible multiplicity of suits (R 6, 7, 8-9, 15-17, 22, 37).

Because of deaths, old age and other circumstances, Subscribers qualified with proper jurisdictional requirements of diversity of citizenship and amount involved, were extremely limited in number. Of those qualified to serve all, except E. Lewis Burnham, declined. Burnham consented on condition that your petitioner would also jointly serve with him (R 10, 17, 37, 46). In the intervening period of upwards of two years this situation was discussed at Petroleum Board meetings. There were discussions at Board meetings of the *Dickinson* v. *Rinke* suit from the time it was commenced (R 14, 32). Accordingly, when it appeared the case was about to be reached for trial your petitioner on April 2, 1942 resigned all official connection with Petroleum (R 32, 37, 40), and with the full knowledge and approval of its Board (and numerous of its stockholders with whom he had been associated for upwards of fifteen years) became one of the representatives to intervene in behalf of the Subscribers as a class. By order of the District Court for New Jersey entered April 14, 1942, Burnham and Vaughan were permitted to intervene (R 4, 37).

At a meeting of Petroleum's Board of Directors, held June 10, 1943, to elect officers it proposed to elect your petitioner a Vice President for accommodation signature purposes. Protesting such action your petitioner reminded the members of the Board of his prior resignation of April 2, 1942, and made a full statement of his status as an intervener with Burnham representing the Subscribers in Dickinson's New Jersey action; fully reviewed the various actions by Dickinson, and the protective defenses and counter actions by Petroleum and the status of each; that both Petroleum and the Subscribers were seeking recovery of the $87,310.28 fraudulently appropriated by Dickinson and Lloyd and why there was an apparent conflict of interest between his position as an intervener and that of Petroleum but that this apparent conflict should be resolved as a matter of law because the facts to be proven at the trial determining the right of recovery as between them were the same and from a common source. Expressing appreciation of your petitioner's statement and position the Board nevertheless "felt that the best interests of the Company would be served through (your petitioner's) election as Vice President" and accordingly elected your petitioner a Vice President (R 8, 10, 22-24).

Thus three actions were pending for trial. Ultimately Dickinson's attorneys agreed to trial in the District Court for the Southern District of New York of all issues between the parties in all pending actions and on motion of Petroleum's New York counsel, J. Harlin O'Connell, an order of that Court, with Stipulation of Counsel for each of the parties pursuant thereto, was entered December 3, 1943 permitting Petroleum and Burnham and Vaughan, in behalf of themselves and all other Subscribers, to intervene in Dickinson's New York action and all other pending actions were discontinued (R 5, 20, 37).

Prior to the second trial of Dickinson's New York action Petroleum filed a Counterclaim demanding cancellation of

its said stock sought by Dickinson and recovery of $87,310.28 from Dickinson and Lloyd as a secret and unlawful "profit."

Further complying with the recommendation of each of Petroleum's several attorneys and with the full knowledge and approval of Petroleum's Board of Directors, interveners Burnham and Vaughan, representing the Subscribers, also filed a Counterclaim against Dickinson and Lloyd demanding recovery of the same $87,310.28 as a secret and unlawful profit. However, Burnham and Vaughan did not deny Petroleum's right to recover said sum. On the contrary their counterclaim alleged:

> "Either (Petroleum) Conversion (Corporation) is entitled to recover from Dickinson and Lloyd jointly and severally the said illegal and fraudulent profit of $87,310.28, or the interveners herein, for and in behalf of themselves and all other similarly situated Rinke Agency subscribers, are entitled to recover said illegal and fraudulent profit of $87,310.28 from Dickinson and Lloyd jointly and severally."[2]

In his Reply to the Counterclaim of Burnham and Vaughan Plaintiff Dickinson, inter alia, alleged:

> "For a Second Affirmative Defense to said Counterclaim, Plaintiff:
>
> "19. Denies that interveners Vaughan and Burnham and the persons they purport to represent do in fact constitute a class; and denies that said persons are properly or adequately or fairly represented by said interveners; and, on the contrary, alleges, on information and belief, that intervener Vaughan in now and has been ever since December 15, 1926, a director of Conversion and is now and for a long time has been an officer and stockholder of, and attorney for, Conversion; that intervener Burnham was a director of Conversion from December 15, 1926, to 1930, and is now and has

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[2] *Dickinson* v. *Rinke et al.*, Transcript of Record pp. 47, 57, 10.

been for a long time a stockholder of Conversion; and that the interests of the interveners and of Conversion and its stockholders are antagonistic to the interests of the persons whom the interveners purport to represent."[3]

Thus Petroleum and the Subscribers joined to secure a recovery. The trial of Dickinson's New York action was conducted by Petroleum's attorney, O'Connell, with the active participation of your petitioner who appeared as attorney of record for Burnham & Vaughan with the knowledge of the Court and with the knowledge and approval of Petroleum's Board of Directors, there being discussion of the Dickinson v. Rinke suit in its meetings from the time the suit was instituted and at no time was there any concealment of any activity in which your petitioner participated (R 14-17, 31-32, 37).

After the second New York trial closed, the Court stated that the evidence in the case established the frauds of Dickinson and Lloyd and specified the two points he desired to be covered in the briefs of counsel.[4] There were no oral arguments before the Court. A joint Brief was filed by O'Connell, attorney for Petroleum, and your petitioner for the Subscribers, stating on page 1 thereof:

"Among themselves there is no dispute between parties as to the facts herein, and the only conflicting claims are those between (Petroleum) Conversion (Corporation) and interveners Burnham and Vaughan with respect to the Dickinson-Lloyd fraudulent profit of $87,310.28 the right to which said parties request this Court to determine."

Likewise, joint proposed findings of fact and conclusions of law were submitted.[5]

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[3] *Dickinson* v. *Rinke et al.*, Transcript of Record, p. 16

[4] *Dickinson* v. *Rinke et al.*, Transcript of Record, p. 66.

[5] *Dickinson* v. *Petroleum Conversion Corporation*, 338 U.S. 507, 513, 94 L. ed. 299, 303, Note 5.

After referring in his decision to attacks upon your petitioner by plaintiff's attorney in cross-examination the District Court said:

> "Vaughan impressed me as being an honorable member of the Bar, and as a truthful witness. I believe that both Vaughan and Burnham, who were Subscribers for substantial amounts under the Rinke Agency Subscription Agreements are proper representatives of the Rinke Agency Subscribers as a group to assert their claims as a class. Rule 23(a) F. R. C. P."[6]

A decree was entered on April 10, 1947 which sustained the claim of Burnham and Vaughan on behalf of the Subscribers for recovery against Dickinson and Lloyd of the total sum of $176,245.24, with interest. This decree further provided for notice to the Subscribers and their successors in interest, not then parties to the action, as to their rights under said decree and to intervene and assert their claims for their respective shares of said award. Said decree was entered on the motion of the attorney for Petroleum jointly with your petitioner as attorney for the Subscribers.[6a]

After the proceedings in accordance with said decree of April 10, 1947, a judgment was entered on August 3, 1948, awarding to the seventy (70) Subscribers and their successors in interest who intervened and claimed their respective shares of said award.[6b]

The judgments of the District Court were unanimously affirmed by the Court of Appeals for the Second Circuit on May 16, 1952, (*Dickinson* v. *Burnham*, 197 F(2) 973).

At the close of the proceedings in accordance with said decree of April 10, 1947, in March 1948, one Alexander Kahan, Esq., a New York attorney representing two indivi-

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[6] *Dickinson* v. *Rinke et al.*, Transcript of Record, p. 159.
[6a] *Dickinson* v. *Rinke et al.*, Transcript of Record, pp. 318-321.
[6b] *Dickinson* v. *Rinke et al.*, Transcript of Record, pp. 485-589.

duals who immediately prior thereto acquired certain of Petroleum's preferred stock, unsucessfully attempted in a "strike suit" to intervene in the protracted *Dickinson* v. *Rinke* litigation alleging, *inter alia,* that Petroleum had not been properly represented at the trial on the merits, that there was a conflict of interests at the trial between O'Connell, who appeared for Petroleum, and your petitioner, who appeared for the Subscribers, and that your petitioner "controlled" the Petroleum Board of Directors (R 1-3, 93-95).

Said Kahan again, upon the adjudication of Petroleum as a bankrupt August 8, 1948, attempted to step into the litigation and unsuccessfully sought in behalf of four creditors to appeal the judgment of the District Court entered April 10, 1947.[7]

Mr. Kahan's tandem attacks (basically against your petitioner) were the first and only ones made during the protracted and complicated *Dickinson* v. *Rinke* litigation in the period 1938-1948. No objection was made on the part of any real party in interest. This attack by the Trustee and his attorney stems directly from and projects the unsuccessful efforts of said Kahan to enter the litigation at its close and his unsuccessful efforts to enter the Petroleum bankruptcy proceeding at its beginning (R. 2, 3).

Petroleum was adjudicated a bankrupt on August 8, 1948 on its voluntary petition in the District Court for Delaware. One William A. Duffy, Jr., Esq., was appointed its temporary receiver and thereafter elected Trustee in bankruptcy. One Thomas Cooch, Esq., became his attorney (R 95).

As a scheduled creditor your petitioner filed two claims with the Trustee on November 19, 1948: Claim No. 42 for principal and interest on bankrupt's notes in the amount of

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[7] *Dickinson* v. *Petroleum Conversion Corporation,* 388 U.S. 507, 513, 94 L. ed. 299, 303, Note 5.

$318.00, and Claim No. 43 for unpaid balance for legal services, rendered to bankrupt under retainer of $300.00 per month, due your petitioner in the amount of $2,000.00 (R 30, 31). The retainer covered legal services rendered other than in litigated matters (R. 32).

At an adjourned first meeting of creditors held January 19, 1949 two reports were submitted and considered, viz:

1. An Accountant's report on selected items prepared at the behest of Kahan, purporting to cover the years 1946, 1947 and 1948 (R 25);

2. "Mr. Cooch's Memorandum" submitted as the Trustee's report of an independent investigation made by them of the second New York trial of the *Dickinson* v. *Rinke* case. Contrary to Kahan's contentions the Trustee's report recommended that no appeal from the District Court judgments be taken, stating in part,

> . . . "Mr. Kahan, in urging an appeal, lays great stress on a claimed conflict of interest between Mr. Vaughan and Petroleum Conversion Corporation. It is admittedly true that Mr. Vaughan and Mr. J. Harlin O'Connell, attorney for Petroleum Conversion Corporation, worked together on the case, and this, it seems to the Trustee, was fully justified to the extent that their respective claims were identical except as to the identity of the proper claimant. The conflict as to this was disclosed to Judge Leibell on the first page of the joint brief submitted by them at the conclusion of the trial. Apparently no objection was raised to this cooperation between Counsel until about March 1, 1948, when Mr. Kahan petitioned for leave to intervene and made substantially the same contentions.
>
> "Judge Leibell, in denying this petition on March 16, 1948, said, inter alia:
>
> 'Insofar as their petition for leave to intervene is based on the charge that the Corporation's right in respect to the $175,000 claim have not been fully and

honestly presented, the history of this litigation, as set forth in the Court's opinion of October, 1946, and the trial record show that any such charge is baseless.' "

The report submitted by the Trustee was approved by the creditors.[8]

Based on a consideration of the Accountant's report the Trustee and Kahan's local attorney, one Stiftel, at the creditors' meeting of January 19, 1949, raised and discussed at length the question of restitution and sought authorization to proceed against your petitioner for all fees paid to him by the bankrupt for legal services rendered to bankrupt during the period 1938-1948, including a deferred fee of $3,500 paid in 1946 for services incident to discovery and disclosure of the Dickinson-Lloyd frauds, on the alleged grounds that petitioner represented conflicting interests—a repetition of the ground previously alleged by Kahan in his petition to intervene in his said strike suit at the close of the *Dickinson* v. *Rinke* protracted litigation above referred to at pages 10-11.

Then having under consideration before him

1. Your petitioner's two claims as a scheduled creditor for a balance of $2,000 due on retainer and for principal and interest due on bankrupt's note of $318 (R 30-31);

2. "Mr. Cooch's Memorandum" submitted by the Trustee as his report on their investigation (R 1); and

3. The Accountant's report (R 25),

the Referee, addressing himself exclusively to the matter of his summary jurisdiction to determine substantial adverse claims between your petitioner and the Trustee, determined and ruled,

a) In response to requests for authority to proceed for restitution on the alleged ground of improper use of bank-

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[8] *Dickinson* v. *Petroleum Conversion Corporation, supra,* Note 5.

rupt's funds employed in bankrupt's defense throughout the litigation against Dickinson's attacks—

> (The Referee): "That is not for decision here" (R 8); "This is more of an inquiry" (R 9);

b) In response to the Trustee's request for authority to proceed for restitution from your petitioner based on the Accountant's report—

> (The Referee): "It is not before me to decide about this thirty-three thousand—that will have to be on an independent suit, after you take your steps in between, assuming you do—I don't know whether you are going to have that in mind" (R 9);

c) In response to the Trustee's contention for "recovery in the interests of the creditors"—

> (The Referee): "I am not now sitting nor can I make any decision whether there is any legal sufficiency to what could be contended, nor could I agree that you have proven it. . . . I think that would come if you were to bring a suit against these directors for unauthorized expenditures of money" (R 11);

d) In response to the Trustee's contention that the interests of the bankrupt and those of the Subscribers were separate and reminding the Trustee that Dickinson was throughout the litigation moving affirmatively against the bankrupt and it was required to defend—

> (The Referee): ". . . Now, the only thing we determine, in a first meeting of creditors is possible sources of recovery of assets for diversion. This isn't the tribunal which would determine whether Vaughan, in giving opinions at this June, 1939 meeting used his best judgment or was technically at fault in not having PCC stop at that time and say to Rinke Agency Subscribers, 'You have got to pay for your own ride'" (R 12);

e) In response to the urge of Mr. Stiftel, Kahan's local attorney, for restitution against your petitioner—

> (The Referee): "We are not trying this conflict, Mr. Stiftel. We are here on a creditors' meeting, and if there has been some technical wrong done to the corporation, that can't be straightened out here. That has got to be done in a suit which the Trustee or creditors would bring against those they would contend are responsible" (R 13).

Neither the Trustee nor his attorney subsequently challenged or moved to vacate the Referee's determination and rulings that he did not have summary jurisdiction to determine adverse claims between the Trustee and your petitioner. Relying on Referee's determination and rulings, your petitioner, as one of the two remaining officers of the bankrupt, thereafter sought by testimony and affidavits in extension of testimony to have the record of the proceedings reflect the facts in the long and complicated litigation.

By affidavit filed February 4, 1949 with permission of the Referee in response to the Accountant's report your petitioner identified his services to the bankrupt; with reference to which the Referee observed:

> (The Referee): "There was some discussion on that (submission of affidavit) and I just want to be clear that I understood the purport of it, because, fundamentally, it only goes to show that there isn't an asset such as the Trustee has been seeking out under his obligation to locate assets" (R 13).

The Trustee nevertheless, contrary to the position indicated in his report, on August 26, 1949 filed objections to both your petitioner's claims, and thereafter at the close of testimony (except as to two claims of other creditors involving fees) filed his Set-off and Counterclaim on October 3, 1949, alleging, *inter alia,* that your petitioner was

"disqualified from receiving compensation for legal services in that he had served conflicting interests"; that the amounts claimed were "in excess of the value of services rendered"; that in the *Dickinson* v. *Rinke* litigation your petitioner "was interested adversely to bankrupt"; that petitioner "exercised such control over the directors of bankrupt and its activities as to make any purported approval of payments" for all legal services between 1938-1948 and for salary as Vice President of bankrupt in the period 1944-1948 a nullity; that petitioner's knowledge of the bankrupt's affairs charged him with knowledge that the salary and fees paid him were unjustifiable and to make it inequitable to receive the balance of legal fees claimed or to permit him to retain the amounts already paid him (R 34-35).

To Trustee's Objections your petitioner filed a detailed affidavit, verified September 27, 1949, in turn objecting to the timeliness thereof on the ground that Trustee's Objections were filed after the Referee had refused to authorize the Trustee to take any action against your petitioner and closed the record (R 30-32).

Responding to Trustee's Set-off and Counterclaim your petitioner, with counsel, conferred on November 1, 1949 with the Trustee and his attorney. In confirmation of the facts discussed in conference your petitioner presented to and left with the Trustee a draft of proposed response to his Set-off and Counterclaim, denominated "answer" denying its unsupported statements and setting forth facts in support of the denials (R 36-39).

On the same day, November 1, 1949, the Trustee filed petitioner's said proposed response with the Referee and without authority.

The attorney for the bankrupt on March 15, 1950 filed a 30-page Memorandum "In Reference to Claims of James A. Vaughan and Counterclaims of Trustee Thereto", spe-

cifically and expressly challenging the summary jurisdiction of the Referee to enter a judgment against your petitioner on the Trustee's Counterclaim. At a scheduled hearing on April 26, 1950 objections were presented in oral argument by the attorney for the bankrupt. Questioned on the jurisdictional point by the Referee, your petitioner adopted in open Court the challenge and objections presented by the attorney for the bankrupt. At the request of the Referee the attorney for the bankrupt thereafter submitted a 10-page Supplemental Memorandum dated May 9, 1950.[9]

On July 6, 1950 the Referee filed, and on July 7, 1950 refiled, his Findings of Fact, Conclusions of Law and an Opinion sustaining the Trustee's Set-off and Counterclaim and directing judgment against your petitioner on the Counterclaim (R 41-56).

Your petitioner on July 13, 1950 filed written protest against Referee's exercise of summary jurisdiction to determine the substantial adverse claims between the Trustee and your petitioner and against the entry of any judgment or order pursuant thereto (R 56-57) which the Referee on July 14, 1950 dismissed (R 58-60).

Your petitioner's Petition for Rehearing to correct material errors, filed September 27, 1950, was denied by the Referee October 20, 1950 (R 95).

Your Petitioner's Petition for Review (R 60-64) filed October 20, 1950 was denied by the District Court for the District of Delaware on August 24, 1951 (R 65-78; *In re Petroleum Conversion Corporation, Bankrupt,* 99 F. Supp. 899). On appeal the Circuit Court of Appeals for the Third Circuit on May 16, 1952 affirmed the judgment of the District Court (R 110-11; *In the Matter of Petroleum Conversion Corporation, Bankrupt,* 196 F. (2) 728).

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[9] Neither the Notice of the hearing nor any Reporter's Minutes of this hearing is certified in the Referee's Record.

On application by petitioner the time within which to file petition for writ of certiorari herein was extended to and including August 23, 1952 by order of Mr. Justice Jackson dated August 12, 1952, and further extended to and including October 13, 1952 by order of Mr. Justice Jackson dated August 22, 1952 (R 113).

The Grounds on Which the Decision of the Court of Appeals Below Rested

Stating that it was in accord with the judgment of the District Court on the issue of jurisdiction of the Referee the Court of Appeals did not discuss same (R 110-11).

On the issue that the claims in the Trustee's Counterclaim were *res judicata,* having been decided in other litigation in the United States District Court for the Southern District of New York (in the case entitled *Dickinson* v. *Rinke et al., Petroleum Conversion Corporation,* and *E. Lewis Burnham* and *James A. Vaughan et al., Interveners,* which is not reported), the Court of Appeals rested its decision on the ground that "it appears" that the cause of action involved in the Counterclaim "is different" from the causes of action litigated in the New York suit and since the rule of collateral estoppel would only make *res judicata* those issues in this proceeding which were actually litigated between the parties or their privities in the prior suit and the issues involved in the Counterclaim were not actually litigated in the New York suit "the referee and the district court" did not err in declining to hold them to be *res judicata* (R 111).

Reasons Relied On for Allowance of Writ

1. When the Referee, with (a) your petitioner's two claims as a scheduled creditor, (b) "Mr. Cooch's Memorandum" submitted as the Trustee's Report and (c) the Accountant's Report before him under consideration, deter-

mined and ruled on January 19, 1949, at the beginning of the proceedings, that he did not have jurisdiction to determine the substantial adverse claims between your petitioner and the Trustee; refused to authorized the Trustee to proceed against your petitioner and closed the record, the Referee had no power thereafter to decide the merits of petitioner's claims.

Neither the Trustee nor his attorney challenged the Referee's jurisdictional determination and rulings.

From time to time thereafter on notice your petitioner continued his testimony on bankrupt's affairs and other creditor claims as one of the two remaining officers of the bankrupt; and filed affidavits with the Referee and Trustee in extension of testimony, with permission of the Referee (R 13).

When, at the close of taking testimony and on October 3, 1949, the Trustee filed his Set-off and Counterclaim, he

(a) disregarded and circumvented the Referee's jurisdictional rulings,

(b) disregarded the fact that his Counterclaim set forth statements which had been previously alleged as special defenses to the Counterclaim of Burnham and Vaughan in the second trial of the case of *Dickinson* v. *Rinke et al.* and determined by the District Court in his decision on the merits, dated October 11, 1946, all of which the investigation of and report on that trial by the Trustee and his attorney should have disclosed (R 93).

(c) failed to produce proof to support statements in his Counterclaim although challenged by petitioner to do so (R 39). A Counterclaim is an affirmative defense and its allegations must be proved (47 Am. Jur. 786, Sec. 103).

Seeking to avoid litigation and waste of assets, your petitioner conferred on November 1, 1949 with the Trustee and his attorney and submitted to them in conference a proposed

response, denominated an "answer", denying statements in Trustee's Counterclaim, and setting forth facts in support of such denials. This instrument was filed with the Referee, not by your petitioner or his attorney, but by William Duffy, Jr., the Trustee, on the same day without authority.

To the injury of your petitioner the Referee not only did not abide by his jurisdictional rulings, but also wholly omitted from his Findings of Fact and Opinion any consideration of or reference to them, or to the fact that your petitioner objected to the exercise of summary jurisdiction by orally approving and adopting in open court, at the closing scheduled hearing on April 26, 1950, the position taken and then argued by the attorney for the bankrupt, in support of his 30-page memorandum entitled "In Reference to Claims of James A. Vaughan and Counterclaims of Trustee Thereto" filed March 15, 1950 (and at the request of the Referee supplemented May 9, 1950 by an additional 10-page Memorandum) protesting that the Referee did not have power in a summary proceeding to determine the substantial adverse claims between your petitioner and the Trustee (R 55, 66, 72).

These omissions are reflected, to the injury of petitioner, in the decision of the District Court in that it states that "The record shows no objection by petitioner to the summary power of the bankruptcy court until after the Referee filed his Findings of Fact and Conclusions of Law" (R 68) and, "Here, petitioner learned from the Referee's opinion he had lost and then, before a final order was entered, he made his objection" (R 70). Excepting such omissions the observations of the District Court would be wholly gratuitous.

After his jurisdictional rulings the Referee either had no power to decide the merits of petitioner's claims and erroneously assumed to exercise jurisdiction based on the Trustee's

Counterclaim, or by his jurisdictional rulings the Refereee lulled your petitioner into a false position to his irreparable injury.

The matter of jurisdiction to determine an issue is of the essence of our judicial system. Jurisdiction is the primary concern of every judicial officer. Whether or not jurisdiction exists may be questioned at any stage of proceedings and by courts on appeal and when questioned must be determined. This established rule of law applies to referees as judicial officers of the Bankruptcy Court and "Where the Referee once decides that he is without jurisdiction, he has no power to decide the merits of the issue."[10]

Attention of the Court is called to the fact that the allegations of the Trustee's Counterclaim are in substance the same allegations previously made in the petition of one Alexander Kahan, Esq., who unsuccessfully sought to intervene in the District Court in March, 1948 at the close of the second trial of the protracted *Dickinson* v. *Rinke* litigation, in behalf of two individuals who shortly prior thereto acquired certain preferred stock of the bankrupt,[11] notwithstanding, in "Mr. Cooch's Memorandum" submitted as the Trustee's report to the Referee January 19, 1949, the Trustee rejected Kahan's "claimed conflict of interest" between your petitioner and the bankrupt in the *Dickinson* v. *Rinke* litigation and approved as "fully justified" the co-operative activities between your petitioner, representing the Subscribers, and J. Harlin O'Connell, representing the bankrupt (R 93-95).

The ultimate objective of Kahan's said unsuccessful efforts to intervene in 1948 and the ultimate objective of

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[10] *Matter of Feynman* (CCA, 2nd), 77 F.(2) 320, 322; *Autin* v. *Piske* (CCA, 5th), 24 F. (2) 626, cert. den. 277 U.S. 601, 72 L. ed. 1009; *Hall* v. *Goggin* (CCA, 9th), 148 F. (2) 774; 2 Collier on Bankruptcy (14th Ed.) 1423, par. 38.09.

[11] *Dickinson* v. *Petroleum Conversion Corporation*, 338 U.S. 507, 513, 94 L. ed. 299, 303, Note 5.

the Trustee's Counterclaim are the same—rechanneling of money recovery subject to multiple fees.

2. The Trustee rested his Counterclaim on grounds that

"5. In the *Dickinson* v. *Rinke* litigation Claimant was interested adversely to Bankrupt:

(a) As an individual subscriber to the Rinke Agency,

(b) As an intervenor in the litigation representing himself and other Rinke Agency subscribers, and

(c) As attorney for the Rinke Agency subscribers in the litigation.

"6. Claimant exercised such control over the directors of Bankrupt and its activities as to make any purported approval of these payments a nullity" (R 35).

The Referee sustained the Trustee and the District Court affirmed the Findings of Fact, Conclusions of Law and Opinion of the Referee expressly basing his decision on the Trustee's allegations that petitioner represented "conflicting interests" and "controlled" bankrupt's Board of Directors (R 71-72).

Both the bankrupt and Burnham and Vaughan, representing the Subscribers, were parties to the *Dickinson* v. *Rinke* action by intervention.

The matters alleged in paragraph 5 of Trustee's Counterclaim were also alleged as an affirmative defense by Plaintiff Dickinson in his reply to Counterclaim of Burnham and Vaughan filed in the second trial of *Dickinson* v. *Rinke et al.*, in the District Court for the Southern District of New York (see pp. 8-9, supra).

The allegation in par. 6 of trustee's Counterclaim of "control over the directors of Bankrupt and its activities" by petitioner is a mere statement and wholly without proof. Challenged by petitioner to produce any director of bankrupt

with whom he had ever served to prove his allegation, the Trustee remained silent (R 39).

Your petitioner was called as a witness and testified and that Court rendered its decision on the merits, dated October 11, 1946.[12]

Further when one Alexander Kahan, Esq., in March, 1948 at the close of the case, sought to intervene in the second *Dickinson* v. *Rinke* trial alleging *inter alia* that petitioner represented "conflicting interests," "controlled" Bankrupt's Board of Directors and the like, the District Court had occasion again to consider such allegations and rendered an opinion dated March 16, 1948 denying Kahan's petition.

This District Court decision is referred to and quoted in part in "Mr. Cooch's Memorandum" submitted as the Trustee's report to the Referee on their investigation of the second *Dickinson* v. *Rinke et al.*, trial (R 93-95). The Trustee's quotation is out of context and inadequate to express the issues. The District Court in his opinion dated March 16, 1948, said:

> "The petition to intervene is based on the claim that Petroleum Conversion Corporation has not been properly represented in this proceeding that there was a conflict of interests at the trial between J. Harlin O'Connell who appeared for Petroleum Conversion Corporation and James A. Vaughan who appeared for himself and Burnham as interveners on behalf of Rinke Agency subscribers; . . . that Vaughan and other Rinke Agency subscribers control the present Board of Directors of Petroleum Conversion Corporation and do not intend to appeal on behalf of Petroleum Conversion Corporation from any final judgment that may be entered herein; that the interest of the stockholders of Petroleum Conversion Corporation require the in-

[12] *Dickinson* v. *Rinke*, Transcript of Record, pp. 16, 35 et seq. 57, 159. See also pp. 8-9, *supra*.

tervention of someone to protect their interests and that therefore petitioner's motion should be granted.

"The litigation involved a number of claims, counterclaims and cross claims. Only as to one of the claims was there any conflict in interest between Petroleum Conversion Corporation and Rinke Agency subscribers—that for the $87,310.28 (increased after trial to $176,245.24) paid to Dickinson and Lloyd out of Rinke Agency funds as a result of fraud and deceit to which Rinke, the trustee, was a party. As to that, both Petroleum Conversion Corporation and the Rinke Agency interveners made the same claim in separate counterclaims against Dickinson. O'Connell carried the burden of the trial and endeavored in every way to establish that Petroleum Conversion Corporation owned the claim. The Court decided October 11, 1946 that the Rinke Agency subscribers had the claim and not Petroleum Conversion Corporation, and that it had been duly proved at the trial. An interlocutory decree was entered April 10, 1947 which directed that notice be given to other Rinke receipt holders to make application for leave to intervene and that meanwhile no judgment for any sum would be entered against Dickinson on the claim.

". . . In so far as their petition for leave to intervene is based on the charge that the corporation's rights in respect to the $176,000 claim have not been fully and honestly presented, the history of this litigation, as set forth in the Court's opinion of October, 1946, and the trial record show that any such charge is baseless. . . .

"For the reasons above stated I have concluded that the petition of Kiely and Pitcher for leave to intervene should be denied. Settle order.

Dated March 16th, 1948.

VINCENT L. LEIBELL,
United States District Judge"

The Trustee's report also pointed out that "Apparently no objection was raised to this cooperation between counsel

until about March 1, 1948, when Mr. Kahan petitioned for leave to intervene and made substantially the same contentions" (R 94). Stating in some detail the nature of such cooperative efforts of counsel at the trial the Trustee's report approved the decisions of the District Court and the cooperation between counsel in the *Dickinson* v. *Rinke et al*,, second trial (R 94).

Nevertheless ten months later, at the close of taking testimony and without explanation, the Trustee filed his Counterclaim.

3. The decision of the Court of Appeals below (affirming without discussion the decision of the District Court on the summary jurisdiction point), in that it rejects the rule in *Cline* v. *Kaplan*, 323 U. S. 96, 100, 89 L. ed. 97, 100, ". . . that consent is not given even though claimant 'participated in the proceedings' provided formal objection to summary jurisdiction is made before entry of the final order," is in conflict with decisions in the Fourth and Ninth Circuits in *Stark* v. *Baltimore Soda Fountain Mfg. Co.* (CCA. 4th), 185 F. (2) 398 and *Hall* v. *Goggin* (CCA. 9th), 148 F. (2) 774; and in that it rejects the rule in the *Cline* case (p. 99) that the Referee ". . . has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. . . . (and) Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily," is in conflict with decisions in the Second Circuit in *Ford* v. *Magee* (CCA. 2nd), 160 F. (2) 457, cert. den. 332 U. S. 759, 92 L. ed. 345 and *McClelland* v. *Greenberg* (CCA 2nd), 142 F. (2) 245; and in that it fails to sustain the Referee's jurisdictional rulings of record that he did not have jurisdiction, is in conflict with the decision in *Matter of Feynman* (CCA 2nd),

77 F. (2) 320, 322 that once the Referee "decides that he is without jurisdiction, he has no power to decide the merits of the issue."

WHEREFORE petitioner respectfully prays that this petition should be granted.

JAMES A. VAUGHAN,
Petitioner,
By GERARD P. KAVANAUGH,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 395

JAMES A. VAUGHAN,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION,

Bankrupt

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (R 110) filed on May 16, 1952 is reported at 196 Fed. 2d 728, and the opinion of the District Court (R 65), filed August 24, 1951, is reported at 99 F. Supp. 899.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Statement of the Case

The facts have been set forth in the foregoing petition.

Specification of Errors

It is submitted that the courts below erred:

(1) in holding that the Referee had jurisdiction in a summary proceeding to determine substantial adverse claims between the Trustee and petitioner;

(2) in holding, contrary to the Referee's own jurisdictional determination and rulings of record, that the Referee had the power to determine the substantial adverse claims between the Trustee and petitioner;

(3) in holding that petitioner consented to the Referee's exercising summary jurisdiction to determine Trustee's adverse claims;

(4) in failing to hold that petitioner did make timely oral and formal objections to the Referee's exercising summary jurisdiction over Trustee's adverse claims;

(5) in holding that the issues involved in the Trustee's Counterclaim were not *res judicata*, having been decided in other litigation in the United States District Court for the Southern District of New York in the second trial of *Dickinson* v. *Rinke et al., Petroleum Conversion Corporation, bankrupt*, and *Burnham and Vaughan et al., interveners;*

(6) in holding that the issues involved in the Trustee's Counterclaim were not actually litigated between the same parties or their privies in the prior New York suit;

(7) in failing to hold that the issues involved in Trustee's Counterclaim are the same issues specially pleaded in the Reply to the Counterclaim of Burnham and Vaughan, filed in the second trial of *Dickinson* v. *Rinke et al., supra*, and that they were litigated and adjudicated by a final judgment in that prior suit;

(8) in failing to hold, and apply the principle, that the doctrine of *res judicata* is not limited to preclusion of relitigation of causes of action; but that material facts or questions in issue in a former action, and there judicially

determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, as the earlier action;

(9) in holding that "the referee and the District Court did not err in declining to hold them (the issues) to be *res judicata*".

Summary of Argument

Point I

The fundamental principles of jurisprudence and decisional law do not permit jurisdiction duplicity and this applies to the Bankruptcy Court in the administration of the Bankruptcy Act.

Point II

The previous final determination of the question of petitioner's adverse interest to and control over the Board of Bankrupt in an action involving the same parties and the identical adverse interest urged here bind the Trustee in this action.

Point III

Petitioner did not consent to the Referee's exercising summary jurisdiction to determine Trustee's adverse claims and filed timely formal objection.

ARGUMENT

POINT I

The fundamental principles of jurisprudence and decisional law do not permit jurisdiction duplicity and this applies to the Bankruptcy Court in the administration of the Bankruptcy Act.

An examination of the Referee's Findings of Fact, Conclusions of Law and Opinion, and of the affirming Opinions of the District Court and of the Court of Appeals discloses complete absence of any reference to or consideration of the Referee's determination and rulings, at the beginning of proceedings before him, that he did not have jurisdiction to determine the substantial adverse claims between the Trustee and petitioner (pp. 14-15 supra). Nevertheless the Referee after making such determination and rulings assumed and exercised summary jurisdiction over such claims without consent of petitioner. Such omissions are extraordinary and significant.

The Referee "has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial". *Cline* v. *Kaplan*, 323 U. S. 97, 99, 89, L. ed. 97, 100; *Louisville Trust Co.* v. *Comingor*, 184 U.S. 18, 25, 26, 46 L. ed. 413, 416. At the time of making his jurisdictional rulings the Referee had before him not only petitioner's Proof of Claims, filed by him as a scheduled creditor, but also, in aid of his determination, the "Memorandum of Mr. Cooch" filed as the Trustee's Report on their independent investigation of the second trial of the *Dickinson* v. *Rinke* case in the District Court for the Southern District of New York with reference to an appeal but directly relating to the subject matter of Trustee's Counterclaim herein (R 34, 35, 93-95), and the Trustee's Accountant's Report of selected items purporting to disclose bankrupt's gains and losses covering

only the last three years of its existence and total payments to petitioner of fees for the ten-year period 1938-1948 and of salary as one of the two remaining officers of bankrupt for the period 1944-1948 (R 35).

"Once it is established that the claim is not colorable or frivolous the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily." *Cline* v. *Kaplan, supra,* p. 99. Patently the Referee recognized petitioner's claims as substantial adverse claims. He did not otherwise question them.

"Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court." *Cline* v. *Kaplan, supra,* p. 99, citing *MacDonald* v. *Plymouth County Trust Co.,* 286 U. S. 263, 76 L. ed. 1093, 52 S. Ct. 505.

"Consent" by the defendant to summary jurisdiction in the *MacDonald* case was a bona fide consent in open court at the trial.

In lieu of expressly classifying petitioner's claims the Referee upon request of the Trustee and Kahan's local attorney for authority to proceed for restitution, based on the Accountant's Report, determined and ruled that he was without jurisdiction in summary proceedings to determine claims between the Trustee and petitioner (R 14, 15). The Trustee did not object to or challenge Referee's jurisdictional rulings. In fact the Trustee had, in the "Memorandum of Mr. Cooch" (then before the Referee), approved the very acts on the part of petitioner, in the second *Dickinson* v. *Rinke* trial, of which he complained ten months later in his Counterclaim.

Petitioner accepted Referee's non-jurisdiction rulings anticipating, if there should be one, a trial on the merits in the ordinary course.

Petitioner appeared in the proceedings as an officer of the Bankrupt and after the Referee's non-jurisdiction rul-

ings continued his testimony on Bankrupt's affairs from time to time, on notice. There is no question as to jurisdiction over him in that capacity.

At the close of taking testimony in the proceedings the Trustee, in an unexplained about-face, filed his counterclaim against petitioner alleging *inter alia* that in the *Dickinson* v. *Rinke* litigation petitioner "was interested adversely to bankrupt" in three specified capacities and that petitioner exercised such "control" over the Directors of Bankrupt as to make any "purported approval" of payments by bankrupt to petitioner for legal services rendered during a period of ten years and for salary as an officer during a period of four years, a nullity.

Seeking to avoid further waste of assets of bankrupt, petitioner, with counsel, conferred with the Trustee and his counsel and confirming the matters there discussed submitted to the Trustee an instrument in writing, denominated an "answer," setting forth denials and statements of fact more extensive than covered in testimony (R 36-39). This instrument was on the day of the conference, November 1, 1949, filed with the Referee "by William M. Duffy, Jr., the Trustee Herein," without authority to do so.

Holding that the filing of proof of claims "alone is sufficient to vest jurisdiction in this Court," admitting that "This question of jurisdiction has caused me much difficulty," and recalling that the attorney for the bankrupt protested the exercise of summary jurisdiction (specifically on petitioner's claim) but significantly omitting to state that petitioner adopted in open court the position presented by the attorney for the bankrupt, the Referee cited *Florance* v. *Kresge* (CCA 4th), 93 F. (2) 784; *Columbia Foundry Co.* v. *Lochner* (CCA 4th), 179 F. (2) 630, 633, 14 A. L. R. (2d) 1349, and *Giffin* v. *Vought* (CCA 2nd), 175 F. (2) 186 to support his jurisdiction.

But none of these authorities is a precedent. In neither of them was there a determination and ruling by the Court that it did not have summary jurisdiction over the respective subject matters prior to assuming and exercising jurisdiction. Further, in the *Kresge* case the unsecured creditor had filed both a claim and a petition to intervene; the *Lochner* case involved the special circumstance that the claimant had sold defective goods to the bankrupt causing its insolvency and the court, as in the *Kresge* case, followed the principle laid down in *Alexander* v. *Hillman,* 296 U. S. 222, 80 L. ed. 192, an equity receivership case involving fraudulently converted corporate assets to the use of its officers who became claimants. In its decision in the *Lochner* case the Court refers to the rule laid down as one in "a case of this sort." And the *Giffin* case is another "of this sort" based on facts entirely different from the instant case.

Assume, as contended, petitioner as an individual submitted himself to the jurisdiction of the Bankruptcy Court by merely filing proof of claims as a schedule creditor, petitioner individually was not subject to the summary jurisdiction of the bankruptcy Court after the Referee made his rulings that he did not have jurisdiction to determine the substantial adverse claims between the Trustee and petitioner. Said the Referee, *inter alia,* "We are not trying this conflict, Mr. Stiftel. . . . if there has been some technical wrong done to the corporation, that can't be straightened out here. That has got to be done in a suit which the Trustee or creditors would bring against those they would contend are responsible" (R 13).

"Once (the Referee) decides that he is without jurisdiction, he has no power to decide the merits of the issue." *Matter of Feynman* (CCA 2nd), 77 F. (2) 320, 322; *2 Collier on Bankruptcy* (14 ed.), p. 1423, par. 38.09.

Absent the principle and its application to Referees as in

the *Feynman* case, *supra,* administration of the Bankruptcy Act would be a compounding of increasing confusion. Otherwise the haze overhanging the matter of jurisdiction of the Bankruptcy Court would be perpetuated rather than dispelled. To the end of clarification is a too-long deferred suggestion, impelled by the *Cline* v. *Kaplan* decision, in *2 Collier on Bankruptcy,* Sec. 23.08 at p. 526 that at the outset of the action the Referee, Trustee or receiver seek a formal statement from the defendant as to his position on the jurisdictional question.

The assumption by the Referee to determine in summary proceedings the substantial adverse claims between the Trustee and petitioner based on Trustee's Counterclaim, after Referee's judicial rulings that he did not have such jurisdiction, was contrary to the fundamental principles of jurisprudence and decisional law and his Findings of Fact, Conclusions of Law, Opinion and judgment are a nullity.

Point II

The previous final determination of the question of petitioner's adverse interest to and control over the Board of Bankrupt in an action involving the same parties and the identical adverse interest urged here bind the trustee in this action.

The Court of Appeals erroneously rejected petitioner's contention that the issues involved in Trustee's Counterclaim were *res judicata,* having been determined in other litigation in the United States District Court for the Southern District of New York in the case of *Dickinson* v. *Rinke.* The grounds for rejection were that "the cause of action involved in the counterclaim in this proceeding is different from the causes of action litigated in the New York suit" and that the issues involved in the Trustee's Counter-

claim were not actually litigated in the prior New York suit (R 111).

The Court of Appeals erred in holding that the issues involved in Trustee's Counterclaim were not litigated.

The Trustee's Counterclaim expressly alleged petitioner's adverse interest to Bankrupt in specified capacities, i.e. that petitioner represented antagonistic or conflicting interests (R 35). This the Referee confirms by selecting the date, April 14, 1942, on which petitioner with Burnham intervened in the New Jersey action subsequent to which he held petitioner not entitled to compensation on the ground "that thereafter petitioner's services in said capacities in connection with said litigation were in opposition to and adverse to the interests of PCC" (R 48).

These identical issues were pleaded in Plaintiff Dickinson's Reply to the Counterclaim of Burnham and Vaughan filed in the second trial of *Dickinson* v. *Rinke* in the District Court for the Southern District of New York (*Dickinson* v. *Rinke, et al., Transcript of Record p. 16;* see also p. supra). Your petitioner testified at the trial in connection therewith and the District Court made his final determination thereon (*Dickinson* v. *Rinke, supra, p. 159;* see also pp. 8-9, supra).

Further the District Court again had occasion to consider the same issues in March, 1948, when one Kahan at the close of the *Dickinson* v. *Rinke* trial unsuccessfully sought to intervene. See the Court's decision set forth in part at pp. 23-24, supra. Moreover the Trustee and his attorney made an independent investigation in New York City of the *Dickinson* v. *Rinke* second trial in January, 1949, prior to Trustee's filing his Counterclaim, when they conferred with Kahan and thereafter made a report to the Referee (R 1-3, 93-95). Their report discloses familiarity with Kahan's prior effort to intervene in the *Dickinson* v. *Rinke* case on

the ground of a "claimed conflict of interest between Mr. Vaughan and Petroleum Conversion Corporation"—(R 94). Indeed Plaintiff Dickinson's special defense of "antagonistic interests"; Kahan's "claimed conflict of interest"; and Trustee's allegation of "adverse interest", are one and the same.

Facts or questions in issue in a former action, and judicially determined, are conclusively settled by a judgment rendered therein, *Myers* v. *International Trust Co.*, 263 U. S. 64, 68 L. ed. 165, and such facts or questions become *res judicata, American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. ed. 231, and may not again be litigated in a subsequent action between the same parties or their privities, *Wyoming* v. *Colorado*, 286 U. S. 494, 76 L. ed. 1245, *United States* v. *Stone D. & Co.*, 274 U. S. 225, 71 L. ed. 1013, whether the subsequent action involves the same or a different form of proceeding, *Hartford L. Ins. Co.* v. *Ibs*, 237 U. S. 662, 59 L. ed. 1165, as the earlier action.

Where a second cause of action between the same parties is upon a different claim or demand, then the established rule is that the judgment in the first action operates as an estoppel as to the points or questions actually litigated and determined, as here. *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, 25, 78 L. ed. 1096; *Bates* v. *Bodie*, 245 U. S. 520, 526, 62 L. ed. 444, 449; *United States* v. *Moser*, 266 U. S. 236, 241, 69 L. ed. 262, 264.

Point III

Petitioner did not consent to the referee's exercising summary jurisdiction to determine trustee's adverse claims and filed timely formal objection.

As a scheduled creditor petitioner filed proof of claims on November 19, 1948 (R 65). The mere filing of a proof of

claim for allowance is not an expression of consent to the jurisdiction of the Bankruptcy Court, particularly to render an affirmative judgment under special circumstances such as existed in the *Kresge* and *Lochner* cases, *supra*. *4 Collier on Bankruptcy, 14th ed.*, Sec. 6820, p. 788-9.

Here, the Referee on January 19, 1949, with the Trustee's Accountant's Report before him indicating Trustee's substantial claims (which were later set forth in Trustee's Counterclaim filed October 3, 1949), determined and ruled that he was without jurisdiction, pp. 13-14, supra, and having so decided he had no power to decide the merits of the issue. *Matter of Feynman, supra.*

However when the attorney for the bankrupt protested the jurisdiction of the Referee in his Memorandum dated March 14, 1950 specifically "In Reference to Claims of James A. Vaughan and Counterclaim of Trustee Thereto", supported by argument before the Referee at a scheduled meeting on April 26, 1950 (prior to Referee's Opinion) petitioner orally in open court adopted the protest of the attorney for the bankrupt also as his position.

The Referee alludes in his opinion to the protest of the attorney for the bankrupt but significantly states, contrary to fact, that petitioner did not challenge his jurisdiction (R 55). The fact is that the scheduled hearing on April 26, 1950 was devoted to argument on said Memorandum of the attorney for bankrupt who at the request of the Referee submitted a Supplemental Memorandum dated May 9, 1950 on the identical subject.

The Referee was not in a position to claim the benefit of the consent rule. He was on sufficient notice to negative consent to his exercising summary jurisdiction, barring his own rulings that he was without jurisdiction herein.

Petitioner's oral protest was sufficient to negative consent. *Hall* v. *Goggin* (CCA 9th), 148 F. (2) 774, 775.

Nevertheless, upon Referee's handing down his opinion on July 6, 1950, withdrawn and refiled July 7, 1950, and prior to the entry of his final order on September 7, 1950 your petitioner filed formal written protest on July 13, 1950 objecting to Referee's exercise of summary jurisdiction to determ ineTrustee's claims herein and to the entry of any judgment or order pursuant thereto (R 56-57).

The jurisdiction of the Bankruptcy Court at the Referee level should not continue to be a game of hide and seek with "consent". Following *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26, 46 L. ed. 416, this Court in *Cline* v. *Kaplan, supra,* at p. 100, confirmed the rule "that consent is not given even though claimant 'participated in the proceedings' provided formal objection to summary jurisdiction is made before entry of the final order".

The Referee having failed to abide by his own jurisdictional rulings; petitioner and the attorney for bankrupt having protested the exercise of summary jurisdiction by the Referee prior to his decision, without success, your petitioner filed formal written protest under the *Cline* case rule.

The decision in the *Cline* case is severely criticized by those seeking greater power for Referees in the name of administration (2 Collier on Bankruptcy Sec. 23.08, pp. 524-526), but even these critics offer the constructive suggestion that at the beginning of bankruptcy proceedings the matter of jurisdiction be clarified—a suggestion, if put into practice, would eliminate unnecessary confusion, waste of time, effort and expense, and immeasurably expedite administration. Consent should be bona fide. This is indicated in the *Cline* case by its reference to *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263, 76 L. ed. 1093, where consent to summary jurisdiction was given in open court.

Granting the petition herein would enable this Court to determine whether the rule in the *Cline* case is to stand as

part of bankruptcy administration procedure or be chiseled away, thus at least reducing the conflict of decisions in the several circuits.

Conclusion

A writ of certiorari should be granted.

DATED: Wilmington, Delaware, October 13, 1952.

Respectfully submitted,

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